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No. 10-1117

Supreme Court, U.S.
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# In The Supreme Court of the United States

RUTH NAGLICH and LAURA FERRELL,

*Petitioners,*

v.

DR. LARRY CAMP and SABRINA MARTINDALE,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID W. LONG-DANIELS
*Counsel of Record*
TODD D. WOZNIAK
PETER N. HALL
BRETT T. LANE
GREENBERG TRAURIG, LLP
3290 Northside Parkway, Suite 400
Atlanta, Georgia 30327
(678) 553-2100
Long-danielsd@gtlaw.com
Wozniakt@gtlaw.com
Hallp@gtlaw.com
Laneb@gtlaw.com

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

## COUNTERSTATEMENT OF QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where there is direct evidence that Petitioners retaliated against Respondents, a former prison dentist and dental assistant, by preventing the hiring of Respondents based on Respondents' reporting a colleague to the Dental Board and the Alabama Department of Corrections for using brutal, painful, and unsanitary practices on inmates.

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## STATEMENT OF THE CASE

### I. Relevant Facts

On this case challenging the denial of summary judgment, Respondents refer to the district court's recitation of the relevant facts. App. 12a-20a. For purposes of assessing the Petition, the following facts are most salient:

> Dr. Larry Camp (a licensed dentist) and Ms. Sabrina Martindale (a dental assistant) are former employees of Prison Health Services, Inc. ("PHS"), a former medical services contractor to the Alabama Department of Corrections ("ADOC"). App. 12a-13a.
>
> While employed by PHS, Camp and Martindale independently filed complaints against PHS's Director of Dental Services, Dr. David Michael West. *Id.*
>
> Camp sent a letter to PHS's Regional Medical Director and to the ADOC Commissioner on December 11, 2003. App. 13a. Camp followed that letter with a formal complaint to the Board of Dental Examiners of Alabama ("Dental Board") on December 17, 2003. *Id.* Camp's December 11 letter and December 17 complaint both stated that West used "brutal and painful" methods for the purpose of reducing demand for dental services, that West re-used unsterilized equipment after treating prisoners (who may well have been infected with HIV and/or hepatitis), and that West failed to maintain adequate supplies for providing dental services. App. 163a-169a.

Specifically, Dr. Camp told the ADOC Commissioner and PHS that

> Having seen [Dr. West] treat inmates the best descriptors would be brutal and painful (methods he knows will reduce demand for dental services). This is not only my appraisal, but also numerous officers and staff at Limestone Correction Facility who recently observed him treat inmates (he only allows one inmate in the office at a time so that no inmate can witness his treatment of another). Additionally, it was reported to me that he used his same favorite surgery instrument repeatedly on numerous patients without sterilization. Inmates do not have a choice of providers and should not be subjected to this type of treatment. Any dentist who practices like this should not be practicing, much less in a position of authority/responsibility.

App. 163a-164a.

Martindale filed a complaint with the Dental Board on January 2, 2004. App. 14a. Martindale's complaint referred to a specific incident in which Dr. West insisted upon using unsterilized dental equipment because it was his "favorite" instrument. App. 171a.

Using unsterilized equipment violates the Centers for Disease Control and Prevention's

(the "CDC") Recommended Infection-Control Practices for Dentistry, and increases the risk of transmission of HIV by over 3700%. App. 39a. The increased risk of HIV transmission affects both inmates and the public as a whole. *Id.*

The Dental Board sanctioned Dr. West on September 8, 2005 for failing to meet the CDC's Infection-Control Practices. App. 180a.

Less than one month after filing the complaints, Petitioner Ferrell, who at the time was a Regional Vice President for PHS, informed Camp that his employment with PHS was being terminated. App. 14a. Camp testified that Ferrell told him that the reason for his termination was failure to follow policies and procedures and not following the PHS chain of command. App. 14a-15a. Ferrell likewise testified that she "[didn't] like that as a regional vice president [of PHS] that [she] was shown a letter of [Dr. Camp's] complaints in front of my client [the ADOC Commissioner]." App. 14a. Less than a year after filing her Dental Board complaint and shortly after her testimony during a Dental Board disciplinary hearing for West, Martindale's employment with PHS was also terminated by Ferrell. App. 15a.

In 2007, the ADOC changed its healthcare contractor from PHS to Correctional Medical Services, Inc. ("CMS"). *Id.* The contract between ADOC and CMS granted ADOC the authority to reject personnel proposed by

CMS. *Id.* Respondents both applied for positions with CMS – Camp applied to be an independent contractor dentist and Martindale applied to be an employee dental hygienist. App. 15a-16a, 19a-20a. CMS thought favorably of Respondents' applications and was prepared to engage both of them. App. 16a, 19a.

Before engaging either of Respondents, Larry Linton, CMS's Regional Vice President, received an email from Dr. West stating:

> I received an email from Mark about a future hire at Limestone – Larry Camp.
>
> This is the guy who wrote everyone from the commissioner down to stir up trouble for PHS. I guarantee you he will not work an 8 hour day consistently. The Board believed his crap against me. No one else did!

App. 16a.

Linton then emailed Petitioners Naglich and Ferrell, who were both employed by ADOC at the time,[1] to ask their views on Dr. Camp as a prospective dentist. App. 16a-17a. Ferrell responded "Absolutely not!" and "This is the one who had us all before the State Dental

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[1] Ferrell was the ADOC Medical Systems Administrator and Naglich was the Associate Commissioner of Health Services. App. 17a.

> Board [regarding] Dr. Mike West." App. 17a. After that email, Linton and CMS stopped pursuing Dr. Camp as a potential contract dentist. *Id.*
>
> After sending an email stating that it was not "in our best interest" to hire Dr. Camp, Naglich spoke with Linton about Camp and Martindale. App. 17a-18a. At the time she made the recommendation against Camp, Naglich had never supervised Camp and had no personal knowledge of any alleged complaints or issues with him. App. 18a. She did, however, know about the letter Camp sent to the ADOC and that a Dental Board complaint had been filed against West. *Id.* While speaking with Linton about Camp, Naglich brought up Martindale's name and mentioned that she had also been fired by PHS. App. 20a. After this conversation, Linton decided not to hire Martindale, either. *Id.*

In their statement of the case, Petitioners misrepresent the factual record in two important respects. First, Petitioners claim that "PHS had established 'a general policy requiring that dentists report misconduct to PHS and the Dental Board.'" Pet. 6. However, there is no evidence of such a "general policy." Rather, the district court assumed for the sake of argument that such a policy existed, and then rejected Petitioners' argument. Pet. 6 (*citing* App. 42a).

Petitioners' second factual misrepresentation is that "Camp acknowledged a 'professional obligation'

to report a fellow dentist to the Board in the event of misconduct." Pet. 6 (*citing* App. 146a-147a). First, the phrase "professional obligation" appears nowhere on those pages of the record, rendering Petitioners' use of quotation marks inappropriate. *See* App. 146a-147a. More importantly, though, Camp was testifying about ethical obligations that he personally felt as a medical professional – *not* any obligation imposed upon him as a result of his specific employment with PHS. *Id.*

Framed in this light, the record evidence is clear that Dr. Camp's complaints to the Dental Board and the ADOC Commissioner were not part of his PHS job duties and Martindale's complaint and testimony to the Dental Board were not part of her PHS job duties. As a result, the district court properly denied summary judgment to Petitioners on qualified immunity grounds and the Eleventh Circuit likewise properly affirmed that denial.

## II. Procedural Background

Petitioners mischaracterize the Eleventh Circuit's ruling. First, Petitioners claim that the Eleventh Circuit accepted "the facts set out by the district court, including, apparently, that Respondents' employer, PHS, had 'a general policy requiring that dentists report misconduct to PHS and the Dental Board.'" Pet. 11. As set forth above, and as evidenced by Petitioners' use of the word "apparently," neither

the district court nor the Eleventh Circuit made any such factual finding.

Second, Petitioners refer to Alabama Code section 34-9-2 and claim that the Eleventh Circuit "accepted that Alabama statutes can help determine the scope of employee duties." Pet. 11 (*citing* App. 8a n.2). In fact, the Eleventh Circuit noted that Alabama statutes "may impose on Camp a general responsibility as a medical professional to report knowledge of other dentists' misconduct to the Dental Board, ***but his job responsibilities as an employee for PHS did not make reporting to the Dental Board part of his official duties***." App. 8a n.2 (emphasis added). In citing *Trigillo v. Snyder*, 547 F.3d 826, 829 (7th Cir. 2008), the Eleventh Circuit was noting that statutory obligations could conceivably be relevant to job duties, but only "to the extent that [the statute] creates responsibilities for that employee's specific job" – a condition that cannot be said to apply to the Alabama Code. App. at 8a n.2.

## REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

The gravamen of Petitioners' argument is that they believed they were allowed to retaliate against Respondents based on Respondents' alerting the Dental Board and the ADOC to "brutal," "painful," and unsanitary dentistry practiced on inmates by Dr. West. Petitioners claim qualified immunity applies

because a purported conflict amongst the circuit courts renders this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), unclear. No such circuit split exists. Rather, the circuit courts have uniformly applied *Garcetti*, reaching varying outcomes only because of varying facts. The lower courts correctly applied *Garcetti* to the facts of this case.

Additionally, the Eleventh Circuit properly denied qualified immunity to Petitioners because they had fair warning that retaliation against Respondents was unlawful. Reasonable officials in Petitioners' circumstances would have known that retaliating against Respondents for speaking to the ADOC and the Dental Board would violate their First Amendment rights. A factually analogous case is not required to override a qualified immunity defense where the constitutional violation is apparent.

Last, Petitioners' attempt to manufacture a circuit split with the First Circuit based on *Philip v. Cronin*, 537 F.3d 26 (1st Cir. 2008), must fail because (1) Petitioners ignore an alternative holding and (2) *Philip* involved a "collective decision" and this case did not. The Eleventh Circuit's opinion did not create or contribute to a split of authority.

Petitioners have entirely failed to show an issue worthy of this Court's consideration. Accordingly, the Court should decline the Petition to issue a writ of certiorari, and allow the case to proceed to trial.

## I. The Lower Courts Correctly Applied the Rule of *Garcetti v. Ceballos* to the Summary Judgment Record in this Case.

Public employees do not forfeit their rights as citizens to engage in free speech when they accept public employment.[2] Nevertheless, a public employee's free speech rights must be balanced against a State's interest as an employer in controlling the job-related speech of its employees.[3] A third interest to be considered in evaluating public employee speech is that of the general public, which has a strong interest in receiving the well-informed opinions of government employees about the inner workings of the government.[4]

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[2] *See Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) ("The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment."); *Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("Official reprisal for protected speech offends the Constitution [because] it threatens to inhibit exercise of the protected right, and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out.") (internal quotation marks and citations omitted).

[3] *Pickering v. Bd. of Ed.*, 391 U.S. 563, 569 (1968) ("The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

[4] *Garcetti*, 547 U.S. at 419 ("The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in

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Considering all the applicable interests, this Court has held that there is an exception to the First Amendment's free speech protections for employees who make statements in their capacities as public employees. *Garcetti*, 547 U.S. at 416-21. ("[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. . . . [But] when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."). A public employee speaks *qua* public employee (and not *qua* citizen) only when he speaks "pursuant to [his] official job duties." *Id.* at 416.

Following *Garcetti*, the threshold question in public employee free speech cases is whether the speech was made "pursuant to . . . official job duties." If so, then the speech is not protected by the First Amendment. If not, then the speech may still be protected, if it was on a matter of public concern and the state does not have a sufficiently strong interest to counterbalance the free speech rights.

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civic discussion."); *Pickering*, 461 U.S. at 572 ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.").

### A. There Is No Circuit Split Following *Garcetti*.

This Court's most recent decision on public employee speech, *Garcetti*, did not announce a new rule of law; it clarified the proper application of existing precedent, such as *Pickering*.[5] For precedential purposes, the most salient fact about *Garcetti* is that the parties admitted that the speech was made "pursuant to . . . official job duties." *Garcetti*, 547 U.S. at 424. Thus, once the line between citizen speech and employee speech was drawn, the result in *Garcetti* became obvious. *Id.* Recognizing that not all future citizen/employee speech cases would be undisputed, the Court went on to describe the rationale behind the "pursuant to . . . official job duties" test, and further described several non-dispositive factors that could guide the "pursuant to . . . official job duties" analysis. *Id.* at 424-25.

To aid future courts in determining whether speech was "pursuant to . . . official job duties," this Court explained that Ceballos wrote his memo "because that is part of what he, as a calendar deputy, was employed to do." *Id.* at 421. The Court then explained that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee

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[5] *See Garcetti*, 547 U.S. at 424; *Freitag v. Ayers*, 468 F.3d 528, 544 (9th Cir. 2006) ("The Court in *Ceballos* relied in large part upon its ruling in *Pickering v. Board of Education*.").

might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22. To further clarify, the Court contrasted the facts before it with *Pickering*, where the public employee's speech was analogous to speech engaged in "by numerous citizens every day." *Id.* at 422. The Court further noted that "employers can [not] restrict employees' rights by creating excessively broad job descriptions." *Id.* After *Garcetti*, each of these factors is relevant to the ultimately practical inquiry of whether the speech was "pursuant to . . . official job duties."

As anticipated by *Garcetti*, the courts of appeals have made the same practical inquiry in various factual contexts.[6] As a result, some cases have held that the employee speech was pursuant to official job duties, and other cases have held that it was not.[7]

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[6] *Garcetti*, 547 U.S. at 418 (noting that the circuit courts will face "'the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal.' The Court's overarching objectives, though, are evident.") (internal citation omitted, ellipsis in original).

[7] *Compare Freitag*, 468 F.3d at 545 ("Under *Ceballos*, Freitag does not lose her right to speak as a citizen simply because she initiated the communications while at work or because they concerned the subject matter of her employment.") *with Casey v. West Las Vegas Ind. Sch. Dist.*, 473 F.3d 1323, 1329 (10th Cir. 2007) (holding that "because advising her employer on 'the lawful and proper way to conduct school business' was admittedly part of her portfolio, we cannot help but conclude

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Given the variety of public jobs, it is hardly surprising that some employees speak "pursuant to their official job duties" and others do not. Additionally, given the number of different audiences for speech – supervisors within the chain of command, coworkers/subordinates, the media, the legislature, or law enforcement – the relevant facts vary widely.[8] From this, Petitioners erroneously conclude that the courts of appeals have made "varied and conflicting statements of the determinative inquiry after *Garcetti*." Pet. 28.

Indeed, Petitioners claim the courts of appeal are applying no fewer than ***nine*** distinct tests to assess whether speech was made "pursuant to . . . official job duties" or not. Pet. 25-27. That is an exaggeration, at best.[9] As a careful reading makes clear, the courts of

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that Ms. Casey made these statements pursuant to her official duties.").

[8] *Compare Fox v. Traverse City Area Public Sch. Bd. of Ed.*, 605 F.3d 345, 346-47 (6th Cir. 2010) (holding that teacher's speech about class size made within chain of command was pursuant to job duties under *Garcetti*) *with Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) ("If however, a public employee takes his job concerns to persons outside the work place in addition to raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen.") *and Rohrbaugh v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 747 (10th Cir. 2010) (noting that "speech directed at an individual or entity outside of an employee's chain of command is often outside of an employee's official duties").

[9] Petitioners claim that at least six circuit cases support two separate "tests" each. Pet. 25-26, nn. 6-9. But as a matter of

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appeals have followed *Garcetti*'s mandate to make a practical inquiry into the job duties and determine whether the speech was in fact "pursuant to" those duties.[10] The Eleventh Circuit has likewise applied the "pursuant to . . . official job duties" test. *See Abdur-Rahman v. Walker*, 567 F.3d 1278, 1282-83 (11th Cir. 2009) (inquiring whether speech was "made pursuant to an employee's job duties"). The courts of appeals may have used different language to describe *Garcetti*'s practical inquiry in different factual scenarios; but they are all applying the same "pursuant to . . . official job duties" test.

Petitioners' claim that a circuit conflict justifies certiorari must fail because there is no split among the circuits, but rather a uniform application of *Garcetti*.

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jurisprudential logic, a court can apply only one test to a set of facts at a time. Adding to the confusion, Petitioners repeatedly insert a new factor into the analysis – whether the speech can be "divorced from" the job – without any support. *E.g.*, Pet. 27.

[10] *E.g.*, *Casey*, 473 F.3d at 1328 ("The Supreme Court last Term in *Garcetti* did revisit *Pickering*'s first prong, however, and added some clarity to the question when a public employee speaks as a citizen rather than as an employee."); *Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007) (applying *Garcetti* to speech by corrections officer reporting security lapse).

### B. There Is No Evidence of Respondents' "Official Job Duties" Sufficient to Reverse the Eleventh Circuit's Decision.

Regardless of any purported circuit split, Petitioners affirmatively claim that Respondents spoke "pursuant to their official job duties," rendering their speech constitutionally unprotected. *E.g.*, Pet. 18. A summary judgment movant who does not bear the burden of proof at trial may win summary judgment by negating an element of a claim. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). To do that, Petitioners were obligated to prove with undisputed evidence that Respondents' speech was "pursuant to their official job duties." *Id.*; *Garcetti*, 547 U.S. at 421.

However, Petitioners have failed to point to any record evidence that describes Respondents' official job duties. Petitioners cannot claim entitlement to summary judgment by virtue of satisfying the "pursuant to . . . official job duties" test without adducing any evidence whatsoever as to what those job duties are. *See, e.g., Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1106 (9th Cir. 2011) (reversing summary judgment on qualified immunity grounds where "there is no evidence that testifying in court, whether or not as an expert, was a part of [the employee's] official duties. . . . When viewed in the light most favorable to [the employee], the record evidence supports a finding that [the employee] was not testifying as part of his official duties.") (internal citation omitted); *Mercado-Berrios v. Cancel-Alegria*, 611 F.3d 18, 26 (1st Cir. 2010) ("The relevant inquiry under

*Garcetti* thus has two basic components – (1) what are the employee's official responsibilities? and (2) was the speech at issue made pursuant to those responsibilities? – both of which are highly context-sensitive.").

Perhaps recognizing the lack of evidence regarding Respondents' job duties, Petitioners now attempt to cobble together evidence that reporting known wrongdoing was a part of both Respondents' jobs. Specifically, they contend that (1) Camp admitted he spoke out pursuant to his job duties; (2) the district court "found" that Camp had spoken pursuant to his job duties; and (3) the Alabama Code imposes an obligation on Camp to speak. These contentions are demonstrably false.

### 1. There Are No Admissions that Speech Was Pursuant to Official Job Duties.

In *Garcetti*, both parties agreed that the speech was pursuant to the plaintiff's employment duties. *Garcetti*, 547 U.S. at 424. Other courts have likewise relied on admissions that the employee spoke pursuant to job duties in holding the speech was not protected. *E.g.*, *Barclay v. Michalsky*, 368 Fed. App'x 266 (2d Cir. 2010). Hoping to take advantage of such cases, Petitioners claim that Camp made such an admission. *See* Pet. 21 ("***As the Respondents have in this case***, the employee in *Barclay* testified that the duty to file complaints was '*my* job' and '*my*

duty.'") (emphasis added).[11] Camp never uttered the words "my job" or "my duty." App. 146a-147a. Instead, Camp testified that he felt an ethical obligation, as a medical professional, to report Dr. West. App. 146a-147a.[12] Similarly, Martindale testified only that she personally felt that Dr. West's misconduct "needed to be reported." App. 151a. Neither Camp nor Martindale tied their personally-felt ethical obligations to their job duties. Such testimony is a far cry from *Garcetti* (or even *Barclay*) where it was entirely undisputed that the speech was made pursuant to official job duties.

### 2. Respondents' Speech Was Not Pursuant to a General Policy Requiring Reporting to the Dental Board.

Petitioners attempt to patch the factual hole in their argument with a reference to a supposed "finding" by the district court that Camp spoke pursuant to a general job policy at PHS "requiring dentists to

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[11] The employee in *Barclay* "concede[d] that she personally received instructions from '[defendant] Hughes, among others, . . . to report the violations verbally to her supervisors.'" *Barclay v. Michalsky*, 368 Fed. App'x 266 (2d Cir. 2010). There is no evidence that Respondents were personally instructed to make their reports to the Dental Board or the ADOC.

[12] Camp was not asked to identify the source of the obligation he felt, but no fair reading of his testimony could suggest that he believed the source was his job at PHS. App. 147a (testifying that "the Act doesn't discriminate about" wrongdoing by dentists, but "every dentist has a different opinion about it").

report misconduct to PHS and the Dental Board." Pet. 18. This mischaracterization of the record was made possible by quoting the district court out of context. What the district court actually said was:

> Moreover, the court is not convinced that Camp's communications made pursuant to a general policy requiring that dentists report misconduct to PHS and the Dental Board – i.e., "inside the chain of command" – are sufficient to bring Camp's letter and complaint within the ambit of unprotected speech.

App. 42a.

Importantly, this language immediately followed the district court's citation to *Garcetti* for the proposition that written job descriptions and employment policies are "neither necessary nor sufficient" to determine official job duties. App. 41a. Seen in the proper context, the district court was assuming such a policy existed for the sake of argument, and was not making a factual finding. Just as importantly, the district court correctly applied *Garcetti* to Petitioners' argument and held that a general chain-of-command policy was not sufficient to render all employee speech "pursuant to . . . official job duties." App. 42a; *see also Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1205 (10th Cir. 2007) (holding that "we cannot deem such a generalized grievance policy to be an official duty without eviscerating *Garcetti*"); *Garcetti*, 547 U.S. at 424 ("We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job

descriptions. . . . The proper inquiry is a practical one.").

There is no evidentiary basis for any court to have made the factual finding Petitioners claim was made. And if such a finding had been made, Petitioners' argument was still rejected.[13] Petitioners have failed to present any evidence regarding Respondents' actual job duties.

### 3. The Alabama Code Does Not Provide Evidence of Respondents' "Official Job Duties."

Finally, Petitioners rely on an Alabama statute governing dentists and dental hygienists in their attempt to prove Respondents' job duties included the speech for which they suffered retaliation. Pet. 18. Petitioners reason that (a) dentists are governed by Alabama Code section 34-9-2; (b) Camp was employed by PHS as a dentist; ergo, (c) Camp's "official job duties" included all the duties set forth in the statute, allegedly including an obligation to report observed misconduct to the Dental Board. Pet. 18. This argument is flawed.

First, Alabama Code section 34-9-2, does not actually require that dentists (or dental assistants

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[13] Even if PHS required Camp to report Dr. West to the Dental Board, he also wrote to the ADOC Commissioner. App. 38a (noting that there is "no evidence of Camp's professional obligation to report such conduct to the ADOC Commissioner.").

like Martindale) report brutal or unsanitary dental practices to the Dental Board. Indeed, to the extent that that entire chapter of the Alabama Code addresses the "official job duties" of dentists, it focuses on the practice of dentistry.[14] Even the section dealing with discipline does not mention any obligation to report "brutal," "painful," or unsanitary dentistry. *See* Ala. Code § 34-9-18.

Moreover, a general obligation imposed by statute is not dispositive as to whether reporting is done pursuant to official job duties. *See, e.g.*, *Trigillo v. Snyder*, 547 F.3d 826, 829 (7th Cir. 2008) ("Such a broadly applicable legal duty says little about Trigillo's duties as the manager of procurement. To define Trigillo's official duties, we must do more than look to general statutes."); *Reinhardt v. Albuquerque Public Sch. Bd. of Ed.*, 595 F.3d 1126, 1137 (10th Cir. 2010) ("[I]t cannot be the case that a criminal liability statute aimed at every public official should somehow become part of every public official's job description."). No state should be permitted to pass a statute of general obligation and thereby grant itself license to retaliate against all its employees, regardless of job.

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[14] *See* Ala. Code § 34-9-6 (listing duties that constitute the practice of dentistry, including "repair[ing] or fill[ing] cavities in the human teeth" or supplying "artificial substitutes for the natural teeth"); § 34-9-27 (listing duties that "may" be performed by dental hygienists, such as "remov[ing] calcareous deposits, accretions or stains from the teeth" or "tak[ing], develop[ing] and mount[ing] oral X-rays").

Even if a statutory obligation to report misconduct existed, it would be limited to reports to the Dental Board. The Alabama Code did not require Camp to report to the ADOC Commissioner. *See Reinhardt*, 595 F.3d at 1137 (holding that even if a statute generally applicable to school employees created a job duty for speech-language pathologist, complaint outside of statutory framework "was beyond [the employee's] professional responsibilities"). If the Alabama Code is the source of Camp's job duties, his report to the ADOC Commissioner could not be pursuant to his job duties. *See* App. 40a.

Petitioners have failed to identify any evidence of Respondents' actual job duties. Without such evidence, it cannot be determined at the summary judgment stage that Respondents spoke "pursuant to their official job duties." As a result, there was no error in denying summary judgment based on qualified immunity.

### C. The Eleventh Circuit Correctly Applied the Non-Dispositive Factors Identified by *Garcetti* and Others.

Given the lack of evidence regarding Respondents' job duties at the time they complained to the ADOC and the Dental Board, the Eleventh Circuit considered various factors to help make its practical inquiry into whether Respondents had acted "pursuant to their official job duties." App. 8a n.2. In addressing each factor and noting that it favored

Respondents, the Eleventh Circuit did not conflict with other cases holding that such factors were non-dispositive, or cases where different facts led to a different conclusion. There is no circuit split warranting this Court's review.

### 1. That Facts Were Learned at Work Does Not Mean Speech Owes Its Existence to Official Job Duties.

Petitioners contend that since Respondents learned about West's misconduct at work, the speech "owes its existence" to the job and is necessarily "pursuant to their official job duties." Pet. 27. However, the place where a public employee discovers facts that he later speaks about is not determinative of whether the speech is "pursuant to [his] official job duties" or not. *E.g., Charles v. Grief*, 522 F.3d 508, 513 (5th Cir. 2008) ("To hold that any employee's speech is not protected merely because it concerns facts that he happened to learn while at work would severely undercut First Amendment rights."). Indeed, Mr. Pickering learned about the facts he included in his letter to the editor at work, but that speech was protected by the First Amendment. *Pickering*, 391 U.S. 563, app'x (1968), ("I teach at the high school and I know this just isn't the case.").

Moreover, to the extent Petitioners argue that the "owes its existence to" language from *Garcetti* creates a but-for causation rule, they misread *Garcetti*. The Court explained that "owes its existence

to" means that the employer has "commissioned or created" the speech. *Garcetti*, 547 U.S. at 421-22. There is no evidence that PHS "commissioned or created" the complaint to either the Dental Board or the ADOC. As a result, the Eleventh Circuit correctly noted that Respondents' speech did not "owe[ ] its existence to" their jobs.

### 2. That Speech Was Related to the Job in Some Way Does Not Mean It Was "Pursuant to . . . Official Job Duties."

Petitioners further argue that because part of Camp's letter to the ADOC related to equipment shortages, his speech was "pursuant to [his] official job duties." Pet. 20-21. However, job-related speech is not necessarily unprotected.[15] Moreover, Respondents also alerted the ADOC and the Dental Board to Dr. West's brutal, painful, and unsanitary dentistry. Petitioners fail to explain how Respondents' report about Dr. West's brutal and unsanitary dentistry would help either Respondent perform their own jobs.

Thus, Petitioners' focus on equipment shortages is a selective citation to Camp's letter, and ignores

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[15] *See Garcetti*, 547 U.S. at 421 ("The First Amendment protects some expressions related to the speaker's job."); *Reinhardt*, 595 F.3d at 1136 (noting that "it would be going too far to hold that every time a public employee discovers alleged wrongdoing related to his job and brings it to the attention of law enforcement or other outside parties, the speech is unprotected").

Respondents' Dental Board complaints, which did not even mention equipment shortages. App. 168a-173a. But even the selective citation is of no avail to Petitioners. That some of the speech in the letter may have been job-related does not render the entire act of speaking unprotected. *See Garcetti*, 547 U.S. at 421 (noting that the "First Amendment protects some expressions related to the speaker's job."); *Davis v. McKinney*, 518 F.3d 304, 314 (5th Cir. 2008) (holding that proper approach is "analyzing mixed speech in a single communication by dividing the communication by topic and applying First Amendment analysis to each topic separately."). Thus, while some of Respondents' speech may have been job-related, Petitioners have failed to show that any of it was pursuant to their official job duties.

### 3. That Speech Was Outside Day-to-Day Job Duties Is Relevant, Though Not Dispositive.

Petitioners claim that the Eleventh Circuit erred in noting that reporting misconduct by other dentists was not part of Camp's "daily professional activity." Pet. 18-20. That fact is true, and relevant to the ultimate question of whether Camp spoke "pursuant to his official job duties." App. 8a n.2. The Eleventh Circuit[16] did not treat this factor as dispositive, and

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[16] It was in fact the district court that used this language, not the Eleventh Circuit. App. 42a.

therefore there is no conflict with the Second Circuit's holding that ad hoc job duties can still satisfy *Garcetti*. *Weintraub v. Bd. of Ed.*, 593 F.3d 196, 203 (2d Cir. 2010) (holding that teacher's union grievance was "pursuant to [his] official job duties" under *Garcetti*, though not a day-to-day job duty of a teacher). There is no error in merely noting that the speech was outside Respondents' "daily professional activity."

**4. Supervisory authority is relevant, but not dispositive.**

Similarly, Petitioners claim that the Eleventh Circuit erred in noting that Camp had no supervisory authority. Pet. 22-23. But the Eleventh Circuit did not treat this fact as dispositive. *See* App. 8a n.2. As a result, there is no conflict with the Seventh Circuit's holding that lack of supervisory responsibility is not dispositive under *Garcetti*. Pet. 22-23; *Vose v. Kliment*, 506 F.3d 565 (7th Cir. 2007) ("While Vose may have gone beyond his ordinary *daily* job duties in reporting the suspected misconduct outside his unit, it was not beyond his official duty as a sergeant of the narcotics unit to ensure the security and propriety of the narcotics unit's operations."). Indisputably, though, the fact that Camp had no supervisory responsibility over West is relevant to the question of whether Camp's report of West's wrongdoing was "pursuant to [Camp's] official job duties." In noting a relevant fact, the Eleventh Circuit cannot have erred.

Having considered various factors that might help determine whether Respondents' speech was "pursuant to their official job duties," there is no evidence that Respondents spoke "pursuant to their official job duties," and the Eleventh Circuit did not err in affirming the denial of summary judgment.

### D. Petitioners Do Not Challenge Any Part of Petitioners' First Amendment Retaliation Claim Other than Whether Their Speech Was Pursuant to Official Job Duties.

Petitioners argue only that Respondents spoke "pursuant to their official job duties." They put forth no opposition to the district court's ruling that the speech was on a matter of public concern, that the *Pickering* balancing test weighs in favor of Respondents, or that there are fact questions regarding whether Petitioners' constitutionally-protected speech was a motivating factor in Respondents' decision to take adverse action. Pet. 43a-48a. Accordingly, the district court and Eleventh Circuit decisions were both proper, and Petitioners have failed to present any compelling reason for this Court to issue a writ of certiorari.

## II. Petitioners Had Reasonable Notice that Retaliation in This Context Would Be Unlawful.

### A. Factually Analogous Case Law Is Not Required to Overcome Qualified Immunity.

Petitioners claim that they were entitled to qualified immunity because the law was not "clearly established" at the time they retaliated against Respondents for their speech. Pet. 24-25. They suggest that the lack of a case holding that prison dentists do not speak pursuant to job duties when they complain outside the chain of command entitles them to qualified immunity.

However, a prior case with materially similar facts is not necessary to demonstrate that the law is "clearly established."[17] Rather, the law at the time of the act need only be sufficiently established to give "fair warning" to the official that his conduct is unlawful. *Hope v. Pelzer*, 536 U.S. 730, 740 (2002) ("[Q]ualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their

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[17] *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.") (alteration in original, internal quotations omitted).

conduct is unlawful.'") (quoting *Saucier v. Katz*, 533 U.S. at 206). Regardless of prior case law, Petitioners should have known that retaliation for speaking out against dangerous, brutal, and unsanitary dentistry being practiced on inmates was unconstitutional.[18]

Petitioners also argue that there is a circuit split over whether the law after *Garcetti* is clearly established. Pet. 29-30. They note that the Second, Seventh, and Eighth Circuits have all granted qualified immunity after *Garcetti*, while the Third, Fifth, Ninth, Tenth (and now Eleventh) Circuits have all denied qualified immunity. Pet. 29-30. Petitioners fail to disclose that the Seventh and Eighth Circuit cases

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[18] In any event, several cases should have put Petitioners on notice that they were prohibited from retaliating against Respondents for exercising their First Amendment rights to report hazardous conditions and expose mistreatment of wards of the State. *See, e.g., Pickering*, 391 U.S. at 574 (employee's criticism of Board of Education is protected by the First Amendment); *Walker v. Schwalbe*, 112 F.3d 1127, 1133 (11th Cir. 1997) ("clearly established law informed reasonable government officials that [Plaintiff] could not be punished for his First Amendment speech," which involved improving the services a state agency provides to the public); *see also Eng v. Cooley*, 552 F.3d 1062, 1076 (9th Cir. 2009) ("Because this case involved mere application of settled law to a new factual permutation, . . . we conclude that Eng's personal First Amendment interest in [his lawyer's] speech was clearly established by 2003."); *Lee v. Nicholl*, 197 F.3d 1291, 1296 (10th Cir. 1999) (public employee's speech alleging a danger to public health or safety is protected by the First Amendment); *Tao v. Freeh*, 27 F.3d 635, 640 (D.C. Cir. 1994) (FBI translator spoke as citizen when reporting race discrimination because her job duties did not include reporting discrimination).

they cite both expressly held that *Garcetti* ***did not apply***.[19] These cases, therefore, cannot contribute to a circuit conflict regarding the availability of qualified immunity after *Garcetti*. The only remaining question is whether the Second Circuit case is in conflict. In that case, the Second Circuit held that qualified immunity applied because "[t]he courts have yet to consider whether speech that would not enjoy First Amendment protection if made pursuant to an official duty can claim such protection when made in violation of that duty." *Drolett v. Demarco*, 382 Fed. App'x 7 (2d Cir. 2010). None of the other cases cited by Petitioners wherein qualified immunity was at issue (including the case at bar), addresses qualified immunity in the context of an employee speaking in "violation of" a job duty. Accordingly, none of those cases, when contrasted with the *Drolett* case, creates a circuit split calling for this Court's review.

The circuits generally agree (and public employers are on notice) that retaliating against employees for engaging in speech outside their "official job duties" is unconstitutional. *See Adams v. Trustees of the Univ. of N.C. – Wilmington*, 2011 U.S. App. LEXIS 7036, *40 (4th Cir. Apr. 6, 2011) ("[T]he underlying right Adams asserts the Defendants violated – that of a public employee to speak as a citizen on

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[19] *Chaklos v. Stevens*, 560 F.3d 705, 711 (7th Cir. 2009) ("*Garcetti* does not apply."); *Dempsey v. City of Omaha*, 633 F.3d 638, 648 (8th Cir. 2011) ("We hold that *Garcetti* simply does not apply to Dempsey's speech.").

matters of public concern – is clearly established and something a reasonable person in the Defendants' position should have known was protected. As such, the Defendants are not entitled to qualified immunity[.]"); *Davis*, 518 F.3d at 317 ("At the time of the alleged violation of Davis' free speech rights, both Supreme Court and Fifth Circuit law clearly proscribed retaliation by a government employer against an employee for engaging in protected speech."). As a result, the lower courts here properly rejected Petitioners' qualified immunity defense.

### B. Where the *Pickering* Balancing Test Weighs Heavily in Favor of Protecting Speech, Reasonable State Officials Are on Notice that Retaliation Is Prohibited.

In addressing the qualified immunity issue, the Eleventh Circuit said, "[i]f a case with analogous facts is needed, the *Akins* case is close enough." App. 6a; *see Akins v. Fulton Cnty., Ga.*, 420 F.3d 1293, 1308 (11th Cir. 2005) ("*Akins I*"). In that case, several Fulton County purchasing employees complained to a county commissioner about bidding irregularities. *Id.* The Eleventh Circuit found that "the result of the *Pickering* balancing was clear and predictable enough to defeat a motion for summary judgment based on qualified immunity." App. at 6a-7a.

Here, the Eleventh Circuit correctly found that the *Pickering* balancing test is similarly clear, predictable, and weighs entirely in Respondents' favor.

App. 7a-8a. The public interest in learning of brutal and unsanitary dentistry practiced by government contractors is extremely high.[20] Moreover, the public has an interest in learning about a dentist whose violation of professional norms could result in the transmission of HIV and hepatitis C within (and beyond) the Alabama state prison population. App. 38a-39a. On the other side of the scale, the state has no interest in retaliating against Respondents for bringing information about West to light. There is no evidence that Respondents' speech caused any kind of disruption. App. 9a ("The manner, time, and place of the plaintiffs' complaints to the Dental Board were appropriate and not unduly disruptive of the State's provision of public services."). And, given that the Dental Board sanctioned West based on Respondents' information, the speech was true and cause for serious concern. App. 174a *et seq*.

Therefore, as the Eleventh Circuit concluded under *Akins I*, the *Pickering* balancing test weighs so heavily in favor of Respondents that Petitioners were on notice that retaliation was prohibited. That notice is sufficient to satisfy the "clearly established" burden and overcome qualified immunity.[21] *See also Cook v.*

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[20] *See, e.g.*, Ala. Code § 34-9-2 ("It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified dentists be permitted to practice dentistry in the State of Alabama.").

[21] Petitioners suggest that the Eleventh Circuit relied on bad law because *Akins I* was overruled. Pet. 31-32 (*citing Akins*

(Continued on following page)

*Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1320 (11th Cir. 2005) ("We therefore conclude that the *Pickering* balance tilted conclusively in favor of Cook such that defendants had fair and clear warning that their actions were unconstitutional."); *Reilly v. City of Atlantic City*, 532 F.3d 216, 233 (3d Cir. 2008) ("[Defendant] provides no compelling support for his argument that the law was not clearly established in this area. The *Pickering* balancing test was clearly established at the time of the alleged retaliation, as was the notion of pretextual discipline in the context of a First Amendment retaliation claim."). Accordingly, there is neither an error nor a split of authority on the issue of qualified immunity that would justify this Court's review of the case.

## III. There Is No Conflict Between The Eleventh Circuit's Decision and the First Circuit's *Philip v. Cronin* Case.

Petitioners finally argue that the Eleventh Circuit's decision conflicts with the First Circuit's decision in *Philip v. Cronin*, 537 F.3d 26 (1st Cir. 2008). In *Philip*, the First Circuit found that the defendant was entitled to qualified immunity because

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*v. Fulton Cnty., Ga.*, 278 Fed. App'x 964, 970 (11th Cir. 2008) ("*Akins II*")). However, the Eleventh Circuit reached a different outcome in *Akins II* only because application of *Garcetti*'s threshold inquiry rendered the decisional basis of *Akins I* inapplicable on those facts. At most, *Akins II* held that *Akins I* was inapplicable in that factual context – not that it was legally wrong.

he reasonably could have believed that his and his superiors' collective decision to terminate the physician-plaintiff did not violate that physician's clearly established First Amendment rights. *Id.*

But the fact that a defendant was granted qualified immunity in one case, and denied it in another, does not necessarily indicate a conflict between the courts deciding those cases.[22] Nevertheless, Petitioners (1) ignore one of the First Circuit's alternative holdings and (2) misstate the facts in their attempt to manufacture a conflict with *Philip*.

### A. The First Circuit's Alternative Holdings in *Philip*.

In *Philip*, the First Circuit addressed a physician's claim of First Amendment retaliation against the Chief Administrator (the "administrator") of his employer, the Office of the Chief Medical Examiner of Massachusetts (the "OCME"). The physician was terminated shortly after sending the governor a critical letter and separate memorandum expressing concerns regarding organ procurement. *Philip*, 537 F.3d at 30-31. The administrator and at least three of his superiors made the decision in a meeting. *Id.* at

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[22] *See Safford Unified Sch. Dist. # 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009) ("We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear.").

31. The meeting participants all favored termination after discussing the memorandum to the governor as well as prior unprofessional behavior by the physician. *Id.*

On appeal of a directed verdict for the administrator, the First Circuit found that the physician had engaged in protected speech and that the temporal proximity between his speech and his termination was sufficient to survive the directed verdict motion. *Philip*, 537 F.3d at 33. Nonetheless, the First Circuit affirmed on qualified immunity grounds. *Id.* at 34-35. The First Circuit held that a reasonable official in the administrator's position could have believed that no First Amendment violation took place, although the Court assumed such a violation in the case before it. *Id.* at 34-35.

First, the court noted that the termination decision was made collectively, and each of the decision-makers had reasons unrelated to protected speech for terminating the physician. *Id.* at 34. Thus, the court reasoned, the administrator could have reasonably believed that the termination decision was not motivated by protected speech. *Id.* Second, the court found that the administrator could have reasonably believed that discharging the physician could "curtail the potential for future harm to the office," and that even if the administrator was mistaken in his belief, such mistake was not egregious. *Id.* at 34-35.

### B. Petitioners Misconstrue the First Circuit's Holding in *Philip* With Respect to the Collective Nature of the Termination Decision.

In their zeal to manufacture a conflict with *Philip*, Petitioners ignore the First Circuit's alternative holding. Collective decision-making notwithstanding, the First Circuit held that the administrator was entitled to qualified immunity because he could have reasonably believed that discharging the physician would have prevented further harm to the office. *Philip*, 537 F.3d at 34-35. This independent ground for granting qualified immunity – which does not exist here – substantially devalues any perceived conflict between *Philip* and the case below.

Moreover, Petitioners attach undue weight to the First Circuit's dicta that the termination decision was made collectively. There is no indication in *Philip* that the collective nature of the termination decision was a determinative factor in the court's finding of qualified immunity. Rather, the court focused on the fact that each of the decision makers, including the administrator, had reasons unrelated to protected speech for discharging the physician. *See Philip*, 537 F.3d at 34. Because the collective nature of the decision was not determinative to the First Circuit's finding of qualified immunity, it cannot support a conflict with the Eleventh Circuit's decision here, even assuming that the decision here was a "collective" one.

### C. The Factual Record Does Not Support Petitioners' Assertion that They Participated in a Collective Decision Similar to *Philip v. Cronin*.

Petitioners rely heavily on the First Circuit's brief discussion of the collective nature of the termination decision in *Philip*. Pet. 35-39. In doing so, Petitioners stretch the facts to fit the description of a "collective" decision. Pet. 38-39. But there is no evidence that CMS's decision to not hire Respondents was made collectively. Rather, Petitioners told Linton to not hire Respondents, and Linton followed their direction.

Specifically, before giving approval for CMS to hire Camp as a contract dentist, Linton emailed Respondents to get their opinion on Camp. App. 16a. Ferrell responded "Absolutely Not!" and referenced Camp's prior complaint to the Dental Board. App. 17a. Upon receiving this email, Linton instructed his recruiter to stop pursuing Camp. *Id.* A few days later, Naglich emailed Linton advising that it was "[n]ot in our best interest" to hire Camp. *Id.* Naglich and Linton then had a conversation in which Naglich conveyed to Linton that the ADOC did not want Camp or Martindale working at ADOC prisons. App. 18a, 20a. Linton testified that, after this conversation, the decision not to contract with Camp was final. App. 18a. Likewise, Linton relayed the message not to hire Martindale. App. 20a.

The facts at bar are distinguishable from those in *Philip*. The record does not show that Linton exercised any discretion, made any recommendation, or participated at all in the decision not to hire Respondents. Unlike in *Philip*, the record before this Court does not reflect a round-table meeting in which participants reached a consensus to take an adverse employment action. Rather, CMS was set to hire both Respondents until Petitioners intervened. After hearing from Petitioners, Linton did exactly what Petitioners told him to do – not hire either Respondent. Indeed, the district court noted Linton's testimony that "if the client doesn't want to hire someone . . . then we won't hire someone. . . ." App. 18a. This process is the antithesis of collective decision-making.

Without a collective decision in this case, Petitioners' argument that the Eleventh Circuit's opinion conflicted with the First Circuit's implodes. There is no conflict among the circuits on any issue raised by the Petition, and the Eleventh Circuit did not err in affirming the denial of summary judgment on qualified immunity grounds. Thus, there is no compelling reason for this Court to issue a writ of certiorari.

## CONCLUSION

WHEREFORE, for all the foregoing reasons, the petition for writ of certiorari should be denied. Respondents request attorney's fees and costs on appeal in connection with their claim under 42 U.S.C.

§ 1983. Respondents also request attorney's fees and costs, including double costs, for Petitioner's filing of a frivolous petition under Supreme Court Rules 42(2) and 43(7).

Respectfully submitted,

DAVID W. LONG-DANIELS
*Counsel of Record*
TODD D. WOZNIAK
PETER N. HALL
BRETT T. LANE
GREENBERG TRAURIG, LLP
3290 Northside Parkway,
Suite 400
Atlanta, Georgia 30327
(678) 553-2100

*Attorneys for Respondents*